COMPARISON BETWEEN SENATE STAFF WORKING DRAFT OF THE MLA PROPOSED AMENDMENTS TO COGSA DATED SEPTEMBER 24, 1999 AND THE FINAL DRAFT OF THE UNCITRAL CONVENTION AS REPORTED AT PAGE 60 IN A/CN.9/645 OF UNCITRAL'S WORKING GROUP III[*]

By Chester D. Hooper
and Vincent M. DeOrchis[**]

The Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea is much broader in scope than was our Senate Redraft. It will cover not only liability, but will also specify the party with the right to control the cargo and the transfer of that right. It will cover much of what our Pomerene Act now covers. It will cover the entire door-to-door multimodal contract for carriage rather than only the tackle-to-tackle scope as does our present COGSA. While it will not directly cover railroads and trucks in the United States, it will cover the liability, if any, of a contracting carrier who sub-contracts to carry goods by rail or road in the United States.

An exception to this rule is the carve out for the European road and rail conventions, the CMR and the CIM COTIF. It does, however, contain a great majority of the material that the MLA recommended that was in the 1999 Senate Redraft of our proposal.

Section 2 – Definitions

The UNCITRAL draft definitions are more extensive than the Senate redraft's. The Senate redraft defined 19 principle terms while the Convention defines 29 terms. The terms "Contract of Carriage, Liner Transportation, Non-Liner Transportation, Carrier, Performing Party, Maritime Performing Party, and Shipper" are necessary to define the scope of the

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[*] This report may be found on the internet at http://www.uncitral.org.
[**] Our views are our own views. They are not necessarily the views of the United States or the MLA.

Convention. The Convention will govern maritime performing parties but not non maritime performing parties. It will also govern contracts for liner transportation more expansively than non liner transportation. The Convention refers to the contracts we know in the United States as Service Contracts as "Volume Contracts." A new definition of Volume Contract was necessary to narrow the definition of Volume Contracts in the new Instrument. The Senate redraft simply referred to the more broad U.S. Code definition of Service Contract. The Convention also includes definitions necessary to define the right of control of the cargo, electronic bills of lading, and other electronic records under the term "Electronic Record."

Section 3 – Application of Act

The scope of the Instrument is more extensively defined than it is in Section 3(a) of the Senate redraft. Sections 3(b) through (e) of the Senate redraft are not included in the Convention, but they could be included in U.S. implementing legislation. The substance of 3(c), (d), and (e) of the Senate redraft may be found in Article 4 of the Convention.

The scope of application in Section 3 of the Senate redraft is covered in a more complicated fashion in Articles 5, 6, and 7 of the Convention. While the Senate redraft, COGSA, the Hague Rules and the Hague/Visby Rules all use a documentary approach to scope of application, the Convention uses the documentary approach,[1] the trade approach, and the contract approach.

The contract approach applies the Convention to all contracts for the carriage of goods to or from a contracting state and to or from a port of loading or port of discharge in a contracting state with certain exceptions. The trade and contract approach applies the Convention to all liner contracts except charter parties or other contracts for the use of space on a ship. The Convention

applies in non-liner transportation if a charter party or other contract for the use of space on the ship was not entered between the relevant parties. The documentary approach applies the Convention in the non-liner trade if a transport document or electronic record has been issued between the parties.

This more complicated definition of scope reaches the same results as the Senate redraft would have reached and reaches the same result that COGSA now reaches with some minor exceptions.

Section 4. Rights and liabilities under other laws.

The material in Section 4 of the Senate redraft is not included in the Convention because it is peculiar to the United States. It could probably be included in U.S. implementing legislation.

Section 5. Duties and rights of carrier.

Material in Section 5 of the Senate redraft is covered by Article 4 of the Convention. The Convention breaks down performing carriers into maritime and non-maritime performing carriers. The Act will govern maritime performing parties, but will not govern non-maritime performing parties. Maritime performing parties would include, but not be limited to, stevedores, terminal operators and other companies working at the port. This change was due in essence to demands by the United States railroads and trucks to be excluded from the Instrument. The Instrument will govern the contracting carrier throughout the multimodal carriage in the United States and in many other countries, but will not govern direct actions brought against the railroad or trucking company if the railroad or trucking company is not a contracting carrier.

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[1] COGSA, the Hague Rules and the Hague/Visby Rules all apply to contracts for the carriage of goods that are

This provision effectively means that the railroad or the trucker would have to issue a bill of lading that included sea carriage. A trucker might issue such a bill of lading for the carriage of household goods. Another exception to the multimodal concept may be found at Article 84 of the Convention. It excludes carriage governed by certain other international conventions that govern the carriage of goods by air, rail, road, and inland waterways. The exception for road and rail was necessary to allow Europe to have the road and rail carriage now governed by the CMR or CIM COTIF continue to be governed by those conventions. So far as we are aware, only the CMR and COTIF would be an exception to the Convention. In the United States, Carmack would be superseded by the Convention for the carrier that issues the contract of carriage. The Carmack Amendment may still apply to the railroad or trucker that did not issue the bill of lading.

Section 6. Responsibilities of carrier and ship.

The duty to exercise due diligence to make the ship seaworthy at or before the commencement of the voyage has been changed to a continuing duty throughout the voyage. These duties are described at Article 15 of the Convention.

Section 7. Contracts of Carriage and Shipper's Load, Count, and Weight Clauses.

This section is covered by Chapter 8 of the Instrument, Articles 37 through 44. The provision of Section 7 of the Senate redraft that would uphold clauses such as shipper's load, weight and count are contained in Article 42 of the Convention with one change. The Senate redraft provided that a shipper's load, weight and count clause would not destroy the prima facie effect of the bill of lading for the receipt of one sealed container said to contain a certain quantity

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evidenced by a bill lading or a similar document of title.

of cargo if the container had somehow been breached during the voyage. The UNCITRAL Working Group did not see any reason to give prima facie effect to the quantity description in a bill of lading even if the container had been breached during the voyage. The majority reasoned that the carrier still would not have had an opportunity to count the cargo when it received the container.

An identity of carrier clause was added to the Convention at Article 39. The United States does not have the problem that 39 is intended to rectify. Many nations were concerned that the lack of identity of a carrier might deprive cargo claimants of the opportunity to commence suit against the carrier. The United States in rem action against the ship and treatment of both charterers and owners as carriers would reach the same result that Article 39 provides.

The provisions of Section 7(h) of the Senate redraft are covered by Chapter 16, Articles 81 to 83 of the Convention. Article 81 is basically the same as Section 7(h) of the Senate redraft, but Article 82 provides certain exceptions for volume contracts. When we drafted the MLA proposal, we treated service contracts as if they were charter parties and did not intend to govern them with the Instrument. The United States industry, both carriers and shippers, wanted the new Convention basically to cover volume contracts in a non-mandatory fashion. They did not want to start drafting the liability provisions of volume or service contracts from a blank sheet. They wished to start from the Convention terms.

Article 82, which was a highly contested article, provides that volume contracts may derogate either upwards or downwards from the terms of the Instrument with certain exceptions and under certain conditions. The parties to a volume contract may not derogate from the obligations of a carrier provided in Articles 15(a) and (b) the duties to exercise due diligence at,

before, and during the voyage to make and keep the vessel in a seaworthy condition, Article 30, the shipper's obligation to provide certain information, instruction and documents, Article 33, special rules for dangerous goods, and Article 63. The volume contract may not relieve a carrier from liability if the carrier would have been deprived of the right to limit pursuant to Article 63. Article 63 provides that the carrier may not limit its liability if the loss "was attributable to a personal act or omission of the person claiming a right to limit done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result."

Section 7(i) of the Senate redraft, foreign forum provision, has been maintained to a great extent in the Convention. This provision was one of the most hotly debated provisions of the Convention. This section of the Senate redraft would overrule the Sky Reefer case to a great extent, but would not apply to parties to a service contract. The Senate redraft would not, of course, apply to charter parties at all; thus, parties to charter parties and parties to service contracts could have chosen foreign fora in which to litigate or arbitrate.

The jurisdiction and arbitration provisions of the Convention are described at Chapter 14, Articles 68 through 76, and Chapter 15, Articles 77 to 79. Both the jurisdiction and arbitrations provisions are "opt in" provisions. They will not apply to a nation that does not specifically opt in to them when ratifying the Convention or at a later date. The opt-in provision was necessary to reach a compromise with many nations that did not wish to address jurisdiction or arbitration at all. They were also necessary because of the European Union. No member of the European Union may enter a treaty with a jurisdiction provision nor could any member of the European Union discuss the jurisdiction provisions. Only the EC could negotiate and ratify jurisdiction provisions on behalf of the members of the European Union. The opt in provision would allow the members of the European Union to ratify the Convention, including the arbitration provisions

of the Convention, but not the jurisdiction provisions before the EC decides whether to opt in to the provisions. As a practical matter, we doubt whether any member of the European Union will opt in to either the jurisdiction or arbitration provisions. These provisions are, however, a great improvement over the status quo in the United States. In short, even if Europe opts out, the United States would still be bound by the jurisdiction and arbitration provisions of the Convention, so that any U.S. plaintiff would be entitled to take advantage of the menu of optional fora in which to commence its case in the United States.

Article 68 would allow a claimant, despite any choice of forum clause in the contract of carriage to commence suit at the domicile of the carrier, the place of receipt of the cargo as agreed in the contract of carriage, the place of delivery of the cargo as agreed in the contract of carriage, or the port where the goods are initially loaded on a ship or the port where the goods are finally discharged from the ship. Cargo claimant could also, at its option, commence suit in the forum chosen in the contract of carriage.

There are certain exceptions to that concept. Parties to a volume contract may choose to arbitrate or litigate wherever they wish. This is in agreement with Section 7(j) of the Senate redraft. The Convention, however, goes one step further. Both the carrier interests and shipper interests in the United States want to be able to bind third parties to the service contract choice of forum clause. Article 69 allows parties to a service contract to so bind third parties if the chosen place is one of those places listed in Article 68, the domicile of the carrier, the place of receipt as agreed in the contract of carriage, the place of delivery is agreed in the contract of carriage, the initial port of loading, and final port of discharge. The third party will only be bound if the choice of forum or arbitration agreement is also contained in the transport document or electronic record and the third party is given timely and adequate notice of the court where the action shall

be brought, and the jurisdiction of that court is exclusive. That court must also recognize the exclusive choice of court agreement.

An action against a maritime performing party, i.e. a stevedore, may only be commenced in its domicile or the place where it performed its services.

The arbitration provisions in Chapter 15, Articles 77 to 78, mirror to a great extent the jurisdiction provisions. They are necessary to prevent circumventing the jurisdiction provisions with the arbitration provisions. If the contract of carriage contains an arbitration agreement, the arbitration proceeding may be commenced by the claimant at any of the places listed above from the jurisdiction provision. The same volume contract exceptions apply to arbitration agreements.

Article 78 is similar to the present law before Sky Reefer in the Second Circuit and other circuits. Since the Convention will not govern charter parties, parties to charter parties may, as they do now, include any jurisdiction or arbitration clause they wish. An arbitration clause may be extended to third party holders of charter party bills of lading as it may be in the Second Circuit today. If the charter party contains an arbitration clause and the contract of carriage specifically incorporates the charter party, referring to the arbitration clause and identifying the parties to and the date of the charter party, or other contract, that charter party or other contract's arbitration clause will apply to third parties.

Section 8. Weight of bulk cargo.

While the Convention does not have a specific section for the weight of bulk cargo as determined by a third party, Article 42 of the Convention would honor a carrier's shipper's weight, load and count clause. In addition, Article 12 provides that the carrier's responsibility would commence when it receives the goods from an authority or other third party from which the carrier may collect them according to the law or regulations of the place of receipt.

Section 9. Rights and immunities of carrier and ship.

These rights and immunities may be found in Articles 18 through 24. They are basically the same as the Senate Redraft, but the carrier's fire defense has been weakened slightly. Cargo will not have to prove that the unseaworthy condition was within the privity and knowledge of the carrier. Article 22 describes liability for delay. The Senate Redraft did not mention delay, but Article 22 basically codifies the rules expressed in Hadley v. Baxendale. It reads "delay and delivery occurs when the goods are not delivered at the place of destination provided for in the contract within the time agreed."

Article 23, Calculation of Compensation, is basically the same as the Hague/Visby Rules. Article 18 concerning the obligation of carrier in the Convention also overrules Snell v. Valescura, and places the burden on both cargo interests and the carrier interests to prove the percentage of liability that should be imposed according to the cause of the damage when the damage was caused by more than one cause, if the carrier would be liable for one or more causes, but not for another cause or causes.

Section 10. Surrender of rights; increase of liability; general average.

The carrier may, as under COGSA and Hague/Visby, increase its liability above the limits set in the Convention. If the carrier does agree to increase its liability, a maritime performing party would not be bound to the increase in liability unless it expressly agreed according to Article 20(2) to the increase. Article 20(4) also provides that "nothing in this Convention imposes liability on a master or crew of the ship or on an employee of the carrier or of the maritime performing party." The carrier's liability will be joint and several with the maritime performing parties if a performing party is liable for the loss or damage.

As mentioned above in the discussion of volume or service contracts, carriers and shippers may increase or decrease their liability in volume contracts within the limits set forth in Article 82 and the articles referred to by Article 82. The Convention preserves general average with the following language at Article 86, "nothing in this Convention affects the application of terms in the contract of carriage or provisions of national law regarding the adjustment of general average."

Section 11. Special agreement as to particular goods.

These rules are governed in Article 83 of the Convention, Special Rules for Live Animals and Certain Other Goods. The carrier may exclude its liability for live animals but may not escape liability if it "acts recklessly and with knowledge that such loss or damage or that the loss due to delay would probably result."

The carrier may also avoid liability if the "circumstances and terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement …" This provision does not apply to "ordinary commercial shipments made in the ordinary course of trade." A negotiable transport document or electronic record may not be issued for the carriage of such goods.

Section 12. Notice of loss or damage.

The notice of loss or damage or delay is set forth in Article 24 of the Convention. It is similar to the Senate redraft but allows 7 working days rather than 3 days to serve notice of loss or damage that is not apparent at the place of delivery. The failure to give such notice results in the same presumption as does the failure to give 3-day notice in COGSA or the Hague/Visby Rules. The failure to give notice will cause a presumption to arise that the cargo was delivered

to the consignee in the same condition as it was delivered to the carrier. That presumption is, of course, a rebuttable presumption.

Section 13. Statute of limitations.

The statute of limitations is governed by Article 64 and 65 of the Convention. The statute of limitations is increased from one to two years.

Section 14. Discrimination between competing shippers.

This subject was not covered in the Convention. If it is to be covered, it should be covered by implementing U.S. implementing legislation.

Section 15. Repeal of 1936 Act.

This provision should also be covered by the U.S. implementing legislation.

Section 16. Application of bills of lading rules to inbound goods.

This provision extended the Pomerene Act to inbound as well as outbound goods in the 1999 Senate redraft. The Convention covers right of control and transfer of rights – basically the same subject matter covered by the Pomerene Act.

Section 17. Effective date.

The Convention provides that it will enter into force on the first day of the month following one year after the date of deposit of the 20th instrument of ratification, acceptance, approval or a session. Once the United States ratifies the Convention, the United States would have to pass implementing legislation. The United States could, of course, enact the Convention as domestic legislation before 20 nations ratify it.

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